

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Electric and Gas Utilities
2021 Triennial Energy Efficiency Plan
Docket No. DE 20-092

Motion for Disqualification of Commissioner Chattopadhyay

NOW COMES the Office of the Consumer Advocate (“OCA”), a party to this docket, and moves for the disqualification of Commissioner Pradip Chattopadhyay from further participation in this docket. In support of this request, the OCA states as follows:

I. Introduction

As the Commission is aware, this adjudicative proceeding is a matter of significant public controversy. As conditioned by a settlement agreement (tab 42), the parties presented a proposed 2021-2023 triennial energy efficiency plan (tab 1) hearing almost exactly a year ago. Fully 316 days into the triennium, the Commission on November 21, 2021 via Order No. 26,553 rejected the proposed triennial plan and, with it, the entire Energy Efficiency Resource Standard under which the state’s ratepayer-funded energy efficiency programs have operated since the beginning of 2018. Two motions for rehearing pursuant to RSA 541:3 are pending, one from the parties to the now-rejected settlement agreement and one from the Department of Energy (“Department”). There has been widespread media

attention and Governor Sununu has weighed in, via a letter on December 14, 2021 praising the Department for its pursuit of rehearing. Litigation over Order No. 26,553 is pending in Superior Court.

On December 6, 2021, Chairman Goldner issued an unnumbered “Expedited Order” (tab 91) in response to a motion from Energy North Natural Gas Corp. d/b/a Liberty for clarification and a stay (tab 90). On December 14, 2021 the Commission entered Order No. 26,556, adding further clarification of the November 12 decision and granting some but not all aspects of the requested stay.

Order No. 26,556 bears the signatures of both Chairman Goldner and the newly confirmed Commissioner Chattopadhyay. At the same time the Commission served the parties with Order No. 26,556, Commissioner Chattopadhyay circulated an e-mail to the parties to which was appended a document captioned as a “Memorandum.” In the Memorandum, Commissioner Chattopadhyay announced that he would not be disqualifying himself from participating in the docket notwithstanding his prior employment with the OCA as its Assistant Consumer Advocate.

The Memorandum signed by Commissioner Chattopadhyay concludes: “Should any motion be filed asking that I recuse myself from this docket, I will consider the merits of that motion and take any required action.” The purpose of this pleading from the OCA is to make the disqualification motion, the potential filing of which Commissioner Chattopadhyay anticipated.

II. Applicable Standard

The OCA concurs with Commissioner Chattopadhyay's analysis of what law applies to the question of whether a member of the Public Utilities Commission should disqualify himself from participating in a proceeding before the Commission.

Specifically, RSA 363:12, VII requires a commissioner to "disqualify himself in proceedings in which his impartiality might be reasonably questioned." *See also* N.H. Code Admin. Rules Puc 202.09(b)(4) (same). RSA 363:19 provides in relevant part that no commissioner may "sit upon the hearing of any question which the commissioner is to decide in a judicial capacity who would be disqualified for any cause." RSA 21-G:22 states that executive branch employees in general "shall avoid conflicts of interest."

Concerning RSA 363:12, VII, the test is not whether a commissioner "subjectively has kept an open and neutral mind" but, rather, "whether facts exist for a reasonable person to question his impartiality." *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 471 (1984). Applying the same standard in the context of the Code of Judicial Conduct, the New Hampshire Supreme Court has stressed that this test is "an objective one, that is, whether an objective disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case." *George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123, 140 (2011) (quoting *Blevens v. Town of Bow*, 146 N.H. 67, 69 (2001)). *See also Lorenz v. New Hampshire Administrative Office of Courts*, 151 N.H. 440, 443 (2004) (in which the justices of the state's highest court disqualified themselves from a

proceeding in which they were called upon to “interpret and evaluate the conduct and statements of two of our current colleagues,” notwithstanding the belief of those justices that they could decide the matter fairly and impartially).

III. Discussion and Analysis

In his Memorandum, Commissioner Chattopadhyay notes that he served as the OCA’s Assistant Consumer Advocate from late 2014 until he left that post to serve as an advisor to the Commission beginning on August 18 of this year. Thus, Commissioner Chattopadhyay was employed by the OCA throughout the period in which this docket was actually adjudicated – i.e., from its inception in August of 2020 through the development of testimony by the OCA, the conduct of discovery, settlement negotiations, and the evidentiary hearings that took place in December of 2020. However, he correctly notes that he was not assigned “to work on the 2021-23 Triennial Energy Efficiency Plan” while at the PUC. Memorandum at 1. He concedes there were office-wide staff meetings where references may have been made” to the proposed Triennial Plan but “to the extent [he] can even recall the content of these references, they were not substantive.” *Id.* Therefore, Commissioner Chattopadhyay determined that is “not privy to any confidential, proprietary, or other information related to the 2021-23 Triennial Plan that it would be inappropriate for [him] to know in [his] role as a Commissioner.” *Id.* at 2.

The Office of the Consumer Advocate respectfully and reluctantly disagrees with Commissioner Chattopadhyay’s characterization of the situation. It is true that as Docket No. DE 20-092 was litigated, he was not assigned to participate in

the development of testimony, discovery, negotiating positions, and any of the other tasks commonly associated with the work of an expert witness in an adjudicative proceeding before the Commission. But he was not employed by the OCA as a utility analyst. Rather, the Supplemental Job Description applicable to the post of Assistant Consumer Advocate – appended hereto – states that the scope of Commissioner Chattopadhyay’s employment at the OCA required him to “direct[] *all aspects* of the representation of residential utility ratepayers on significant adjudicative and rulemaking dockets, as well as participation before the Legislature, and Courts as necessary” (emphasis added.) Among his “accountabilities” – in fact, the first on the list of accountabilities – was “assist[ing] the Consumer Advocate in administration of the agency and perform[ing] the duties of the Consumer Advocate in his/her absence, ensuring prompt response on urgent matters.” *Id.* In other words, this Administrator III position at the OCA was actually a high ranking post in our (admittedly small) agency that involved office-wide responsibilities. In that sense, every matter taken up by the Office of the Consumer Advocate was assigned to Commissioner Chattopadhyay when he was Assistant Consumer Advocate.

As Commissioner Chattopadhyay implicitly acknowledges, energy efficiency – particularly ratepayer-funded energy efficiency – is of the highest priority to the OCA, particularly during the tenure of the incumbent Consumer Advocate. As such, it has been a topic of discussion at virtually every weekly OCA staff meeting since at least February of 2016. In his capacity as the Assistant Consumer

Advocate, Commissioner Chattopadhyay participated in all or virtually all of these meetings. Moreover, in a small organization like the OCA, informal discussions of pending issues are ongoing around the water cooler and freewheeling. The work of our team of five people is not as “siloeed” as Commissioner Chattopadhyay’s Memorandum seems to suggest.

Moreover, unlike other matters that are litigated before the Commission – e.g., rate cases, pilot programs, least-cost integrated resource plans, etc. – internal OCA deliberations related to the state’s Energy Efficiency Resource Standard are not confined to discrete dockets, are ongoing, and often turn on policy, strategic, tactical, and small “p” political considerations. This is true today – it was true during the 316 days the OCA struggled internally and persistently over what to do with the Commission’s seemingly dilatory approach to this docket (the first seven months of which overlapped with Commissioner Chattopadhyay’s tenure at the OCA) -- and it has been true since the undersigned Consumer Advocate took office. The OCA is no mere party to DE 20-092; the Office of the Consumer Advocate holds a seat on the RSA 125-O:5-a Energy Efficiency and Sustainable Energy (“EESE”) Board, the Consumer Advocate chaired both iterations of the EESE Board’s EERS Committee – i.e., the one that worked with utilities to develop the 2018-2021 Triennial Plan as well as the one that likewise collaborated with utilities on the 2021-2023 Plan the Commission has now rejected. The result is that energy efficiency has over the years been a constant and pervasive subject of discussion among everyone who works at the OCA, regardless of Commissioner

Chattopadhyay's earnest lack of any recollection of such discussions that might have a bearing on where Docket DE 20-092 goes from here.

In the context of this case and the standard articulated in the *Seacoast Anti-Pollution League* case, it is important to keep in mind that the substantive dispute now raging so contentiously in this docket is largely a matter of policy. Order No. 26,553 makes that clear. Relying on a sparse set of record citations, the Commission essentially concluded that it no longer favors the basic concept of the Energy Efficiency Resource Standard and instead believes the public interest requires a gradual phase-out of ratepayer-funded energy efficiency in New Hampshire. Commissioner Chattopadhyay by virtue of his tenure at the Office of the Consumer Advocate is aware of how the Consumer Advocate assesses these questions from the standpoint of litigation risk (including risks associated with the legislative process and other forces that might affect the conduct of the OCA). He understands that those assessments are fundamentally internal to the OCA and not suitable for either public disclosure or disclosure to the Commission behind closed doors. A reasonable person would therefore question the impartiality of Commissioner Chattopadhyay as he deliberates with one or more other commissioners on the fate of this highly controversial and publicly visible proceeding.

Finally, the Office of the Consumer Advocate respectfully reminds the Commission of a fact not referenced in Commissioner Chattopadhyay's memorandum. On September 2, 2021, the Consumer Advocate addressed

essentially the same question presented here in a letter addressed to former Chairwoman Martin and dispatched at her request. A copy of the letter is appended hereto. The subject of the letter was the extent to which Commissioner Chattopadhyay and another former OCA employee – both analysts whom Chairwoman Martin aggressively recruited away from the OCA and onto the professional staff of the Commission – could or should participate in Commission dockets to which the OCA is a party.

After listing cases to which each analyst was specifically assigned at the OCA, the letter referenced three other major proceedings – one of which was Docket No. DE 20-092 – and specifically asked the Commission to exclude them from participating in these dockets. The letter explained that all three proceedings were “of high priority at the OCA and . . . the subject of regular office-wide discussion during [the OCA’s] weekly staff meetings and otherwise.” This statement is especially credible given that it was made at a time when the Consumer Advocate had no way of knowing that the former Assistant Consumer Advocate would eventually be promoted at the Commission from Senior Advisor to Commissioner. In essence, the instant motion simply renews the request made by the OCA to the Commission on September 2.

IV. Conclusion

For the reasons stated above, the Commission and/or Commissioner Chattopadhyay acting individually should disqualify Commissioner Chattopadhyay from participation in Docket No. DE 20-092.

WHEREFORE, the OCA respectfully request that this honorable Commission:

- A. Grant the motion of the Office of the Consumer Advocate stated herein,
and
- B. Grant such further relief as shall be necessary and proper in the
circumstances.

Sincerely,



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Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.



Donald M. Kreis